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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

OLEN ROBERSON and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

ROBERT W. BLANCHETTE
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

RALPH J. MOORE, JR.*
JOHN TOWNSEND RICH
ALOK AHUJA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for the Association of American Railroads

* Counsel of Record

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QUESTION PRESENTED

Are the railroad industry and railroad workers—for whom Congress has provided a separate statutory scheme of benefits for occupational injury and disease—covered by the Black Lung Benefits Act, 30 U.S.C. §§ 901-945?

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
Applying the Black Lung Benefits Act to Railroad Workers Subjects the Railroad Industry to Burdensome and Potentially Duplicative Claims by Workers Already Protected by a Separate Federal Statutory Scheme, in the Face of Unmistakable Evidence That Congress Intended That the Act Would Not Apply to Railroad Workers.	4
A. The Language of the Statute Does Not Clearly Include Railroad Workers.	6
B. The Legislative History Shows Explicitly That Railroads Were Not To Be Covered.	8
C. The Fourth Circuit's Insupportable Reading of the Statute Will Have Far-Reaching Consequences for the Railroad Industry.	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 8
Berger v. *Heckler*, 771 F.2d 1556 (2d Cir. 1985) 15
Boston & Maine R.R. v. *Armburg*, 285 U.S. 234 (1932) 4
California Fed. Sav. & Loan Ass'n v. *Guerra*, 479 U.S. 272 (1987) 16
Caminetti v. *United States*, 242 U.S. 470 (1917) 14
Cass v. *United States*, 417 U.S. 72 (1974) 8
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 14
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892) 16
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 5
Eldridge v. *Interstate R.R.*, No. 88-BLA-1870 (Dep't Labor ALJ Decision & Order Awarding Benefits Mar. 27, 1990), *appeal docketed*, No. 90-1356 (Benefits Rev. Bd. Apr. 26, 1990) 18
Eplion v. *Director, OWCP*, 794 F.2d 935 (4th Cir. 1986) 18
Fox v. *Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989) 11
Garcia v. *United States*, 469 U.S. 70 (1984) 14
Hanna v. *Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) 17
Heppner v. *Alyeska Pipeline Service Co.*, 665 F.2d 868 (9th Cir. 1981) 15
In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) 14
Independent U.S. Tanker Owners Comm. v. *Skinner*, 884 F.2d 587 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1922 (1990) 14
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 14
Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 14
Louisville & Nashville R.R. v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), *vacated*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 2, 3

TABLE OF AUTHORITIES—Continued

Page

Miller v. *Federal Mine Safety & Health Review Comm'n*, 687 F.2d 194 (7th Cir. 1982) 16
Mitchell v. *Director, OWCP*, 855 F.2d 485 (7th Cir. 1988) 17
Monterey Coal Co. v. *Federal Mine Safety & Health Review Comm'n*, 743 F.2d 589 (7th Cir. 1984) 15
New York C. R.R. v. *Winfield*, 244 U.S. 147 (1917) 4
Paskel v. *Heckler*, 768 F.2d 540 (3d Cir. 1985) 15
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 13
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 16
Rod Warren Ink v. *Commissioner*, 912 F.2d 325 (9th Cir. 1990) 15
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) .. 5
Schoener v. *Consolidated Rail Corp.*, No. 88-BLA-02125 (Dep't Labor ALJ Decision & Order Awarding Benefits Oct. 26, 1990), *appeal docketed*, No. 91-347 (Benefits Rev. Bd. Nov. 13, 1990) 18
Solis-Ramirez v. *United States Dep't of Justice*, 758 F.2d 1426 (11th Cir. 1985) 14
South Buffalo Ry. v. *Ahern*, 344 U.S. 367 (1953) .. 4
Steelworkers v. *Weber*, 443 U.S. 193 (1979) 16
Train v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) 16
United States v. *James*, 478 U.S. 597 (1986) 15
United States v. *Meyer*, 808 F.2d 912 (1st Cir. 1987) 14
United States v. *South Half of Lot 7*, 910 F.2d 488 (8th Cir. 1990) (en banc), *cert. denied*, 59 U.S. L.W. 3652 (U.S. Mar. 25, 1991) (No. 90-1069) .. 15
United States v. *Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984) 16
United States v. *Wilson*, 916 F.2d 1115 (6th Cir. 1990) 14

TABLE OF AUTHORITIES—Continued

	Page
Urie v. *Thompson*, 337 U.S. 163 (1949)	4, 5
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	13
Watt v. *Alaska*, 451 U.S. 259 (1981)	16
West v. *Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985)	15
STATUTES:	
Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988)	*passim*
30 U.S.C. § 902(d)	*passim*
30 U.S.C. § 931	13
30 U.S.C. § 932(a)	5
30 U.S.C. § 932(b)	11, 12, 13
30 U.S.C. § 932(g)	5
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978)	2, 12
Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1988)	4, 5, 7, 13
Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (1988)	12
30 U.S.C. § 802(d)	11, 12
30 U.S.C. § 802(h)(2)	7
Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977)	12
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1988)	5
33 U.S.C. § 904	5
33 U.S.C. § 905(a)	5
Railroad Retirement Act, 45 U.S.C. §§ 231-231u (1988)	4, 13
45 U.S.C. § 231(b)(2)	14
Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369 (1988)	4, 13
45 U.S.C. § 351(d)	14

TABLE OF AUTHORITIES—Continued

REGULATIONS: Page

20 C.F.R. § 725.490(b) (1990) 11

LEGISLATIVE MATERIALS:

121 Cong. Rec. 29,880 (1975) 9
122 Cong. Rec. 4994 (1976) 9
123 Cong. Rec. 23,160-61 (1977) 12
123 Cong. Rec. 24,239 (1977) 9
124 Cong. Rec. 3432 (1978) 13
Black Lung Benefits Reform Act, 1976: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) 9
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 308 10
H.R. 1532, 95th Cong., 1st Sess. § 2(b) (1977) 9
H.R. 3333, 94th Cong., 1st Sess. § 3 (1975) 9
H.R. 4389, 95th Cong., 1st Sess. § 2(b) (1977) 9
House Comm. on Education & Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 ("Black Lung Legis. Hist.") (Comm. Print 1979) .....*passim*
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 9, 10
S. Rep. No. 1254, 94th Cong., 2d Sess. (1976) 9

OTHER AUTHORITIES:

Annot., *Liability, Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R.3d 735 (1970 & Supp. 1990) 4
Association of American Railroads, Railroad Facts 29 (1990) 2
4 A. Larson, *Workmen's Compensation* § 91.10 (1990) 5

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INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

The Association of American Railroads ("AAR") is the principal trade association of the nation's railroads. Its members operate approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all

railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It filed briefs as *amicus curiae* before the administrative agency and the court of appeals in this case.

The issue presented by the petition for writ of certiorari is whether Congress intended that common carriers by rail and their employees be covered by the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-945 (1988). Various members of AAR have been and are involved in hauling coal from hundreds of mines or other coal facilities. Coal is the largest category of freight moved by Class I railroads (39.3 percent of freight tonnage in 1989) and the largest contributor to the revenues of those railroads (22.4 percent in 1989).[1] If the decision of the Fourth Circuit in this case is allowed to stand, those member railroads may be found liable for the payment of black lung benefits to potentially thousands of railroad employees who have spent some portion of their working lives involved in coal movements, even though those employees have other, congressionally mandated avenues of relief.

The railroad industry has long been concerned about this issue, which first arose after enactment of the Black Lung Benefits Reform Act of 1977. Shortly thereafter, fifteen railroads sued and obtained declaratory and injunctive relief in the Western District of Kentucky, prohibiting the Secretary of Labor from applying the Act to railroad employees or to railroads. *Louisville & Nashville R.R.* v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981) (Pet. App. 11a). On appeal, the Sixth Circuit vacated the decision below on the ground that the district court lacked subject matter jurisdiction, because Congress had specifically provided a statutory scheme in which claims must first be decided administratively and then reviewed in the courts

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[1] Association of American Railroads, Railroad Facts 29 (1990).

of appeals. 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

AAR is filing this brief to emphasize the importance of this case to the railroad industry and to support petitioner's demonstration that the Fourth Circuit erroneously rejected unmistakable evidence that Congress never intended to bring railroad workers or common carriers by rail within the coverage of the BLBA. That conclusion is fully consistent with, if not compelled by, the statutory language and is explicitly confirmed in the legislative history. The Fourth Circuit's decision to include railroad workers, based on the supposed "plain meaning" of statutory language that, if anything, points the other way, is symptomatic of an approach to statutory construction that demands correction by this Court. Moreover, the decision creates an unworkable and open-ended standard that threatens to subject the railroad industry to thousands of black lung claims, contrary to all indicia of congressional intent. This dismissal of clear congressional intent on the scope of an important benefit statutes—by a short-handed division of the court of appeals[2]—deserves review by this Court.[3]

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[2] Judge Wilkinson was a member of the panel that heard oral argument in the case but later recused himself. Pet. App. 1a. He was not replaced.

[3] Counsel for the parties have furnished written consents to the AAR's filing this brief as *amicus curiae*, and copies of those letters have been filed with the Clerk.

ARGUMENT

Applying the Black Lung Benefits Act to Railroad Workers Subjects the Railroad Industry to Burdensome and Potentially Duplicative Claims by Workers Already Protected by a Separate Federal Statutory Scheme, in the Face of Unmistakable Evidence That Congress Intended That the Act Would Not Apply to Railroad Workers.

Coal is the largest category of freight moved by Class I railroads and the largest contributor to the revenues of those railroads. Thousands of railroad workers are involved in the movement of coal, and thus may have some exposure to coal dust. Those workers are already covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, which preempts state workers' compensation laws [4] and establishes a comprehensive scheme for compensation of workers for work-related injuries and occupational disease, without any statutory ceiling on liability. It is undisputed that black lung disease is covered by the FELA.[5] Railroad workers are also covered by two other federal statutes that provide benefits for sickness or disability: the Railroad Retirement Act, 45 U.S.C. §§ 231-231u, and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369.

If, as a result of the Fourth Circuit decision, significant numbers of railroad workers exposed to coal dust are found to have valid claims under the BLBA—an Act designed for the special benefit of coal mine workers—a substantial financial burden will be imposed on the railroad industry.

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[4] *South Buffalo Ry.* v. *Ahern*, 344 U.S. 367, 371 (1953); *Boston & Maine R.R.* v. *Armburg*, 285 U.S. 234, 238-239 (1932); *New York C. R.R.* v. *Winfield*, 244 U.S. 147, 148-54 (1917).

[5] See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 180-87 (1949) (silicosis allegedly resulting from inhalation of dust particles during railroad employment actionable under FELA); Annot., *Liability, Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R.3d 735 (1970 & Supp. 1990).

Moreover, because the BLBA does not clearly provide that remedies under the Act are exclusive[6] or that benefits should be reduced by amounts payable under the FELA and the other railroad benefits statutes,[7] years of litigation may be necessary to establish whether the railroads can be subjected to duplicative proceedings and remedies under the BLBA and those railroad-specific statutes. The burdens of such claims and of such potentially duplicative proceedings would be unavoidable had Congress intended to impose them, but it did not.

The Fourth Circuit ruled that the railroad worker in this case—who was exposed to coal dust in the course of his regular railroad employment in connection with the railroad's movement of raw coal from a mine site to a distant preparation plant—was entitled to benefits under the BLBA because he came within the supposedly "plain language" of the statutory definition of a "miner" in 30

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[6] The BLBA, in 30 U.S.C. § 932(a), incorporates by reference 33 U.S.C. § 905(a), a provision of the Longshore and Harbor Workers' Compensation Act which provides that "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee." But 33 U.S.C. § 904 is *not* incorporated into the BLBA. Thus, it is unclear whether the BLBA in fact affords the exclusive remedy for occupational disease compensable under the Act. See *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 320-21 & n.14 (7th Cir. 1977) (observing, in *dictum*, that "Congress appears to be saying that employers are entitled to the exclusivity benefit" when the BLBA applies, but noting that this conclusion is not free from doubt).

[7] The BLBA provides that "the amount of benefits payable under [the Act] shall be reduced * * * by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis." 30 U.S.C. § 932(g). But this Court has observed in other contexts that the FELA is not a workmen's compensation law. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957); *Urie* v. *Thompson*, 337 U.S. 163, 183 (1949). See also 4 A. Larson, *Workmen's Compensation* § 91.10, at 16-528 (1990).

U.S.C. § 902(d). Pet. App. 6a. Accordingly, it found "no need to resort to the Act's legislative history." Pet. App. 7a. However, the statutory language does not plainly cover the railroad industry, the legislative history expressly excludes that industry, and the Fourth Circuit's extraordinary reading of the statutory language creates the potential for thousands of black lung claims by railroad workers and years of litigation to settle the scope of the Fourth Circuit's analysis.

A. The Language of the Statute Does Not Clearly Include Railroad Workers.

Only persons who qualify as "miners" as defined in 30 U.S.C. § 902(d) are entitled to benefits under the BLBA. The first sentence of this statutory definition states that the term "miner" means

> "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal."

The second sentence states:

> "Such term *also* includes an individual *who works or has worked in* coal mine construction or *transportation in or around a coal mine*, to the extent such individual was exposed to coal dust as a result of such employment." *Id.* (emphasis added).

The natural reading of this provision is that transportation workers must meet the test of the second sentence —that they work in "transportation in or around a coal mine" and that they be exposed to coal dust as a result of such employment. Workers transporting coal are not, in the usual sense, "working * * * in the extraction or preparation of coal," as the first sentence requires. Moreover, the express reference to transportation workers in the second sentence of the definition makes that sentence the natural and exclusive source of the test for coverage of those workers.

On this straightforward reading of the statute, railroad workers are not covered. Railroad workers such as Roberson do not transport coal "in or around a coal mine" or "in and around" a coal preparation facility.[8] They are engaged, for a common carrier, in transporting coal *away* from coal mines to other sites—either to distant preparation plants, as here, or to plants where processed coal will be consumed. The "transportation [of coal] in or around a coal mine," naturally read, refers to transportation from the actual point of extraction to the point at which the coal is ultimately loaded for transportation away from the mine site, and to other transportation from point to point at the mine or preparation facility property. It is these latter transportation functions, which would normally be performed by employees of the mining company or independent contractors hired for such purposes, and not by common carriers by rail, that come naturally within the term "transportation [of coal] *in or around* a coal mine."

This reading squares congressional intent with the problem being addressed, because non-railroad coal transportation workers do not have another federal remedy. Railroad workers, by contrast, have been protected by another federal law—the FELA—since 1908. Exclusion of railroad workers avoids potential conflicts between two federal remedial regimes.

The Fourth Circuit did not even address this natural reading of the statute. Utterly without explanation, the court read the provision to require the inclusion of transportation workers "who were involved 'in the extraction or preparation of coal'" (what it termed the "function test") and "who worked 'in or around a coal mine'" (what it termed the "situs test"). Pet. App. 5a. This reading unnaturally subjects transportation workers to a

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[8] A coal preparation facility, as well as the actual mine site, satisfies the statutory definition of "coal mine." 30 U.S.C. § 802(h)(2).

test derived from the *first* sentence of the definition. Even on that reading of the statute, the "plain words" do not point to coverage of railroad workers. Railroad workers like Roberson are no more "working in the preparation of coal" than they would be "working in the manufacture of automobiles" if they moved automobile engines by rail from Pontiac to Detroit. The Fourth Circuit's sole justification for concluding that this language covers railroad workers is to say: "Transporting raw coal to a preparation plant *plainly* is part of the preparation of coal." Pet. App. 6a (emphasis added). There is nothing "plain" about that conclusion. It is based on an unnatural reading of the statutory language, and it certainly is not compelled by that language.

In short, the statutory language on which the Fourth Circuit relied does not point naturally to the conclusion that Congress intended to bring employees of common carriers by rail under the coverage of the statute, and the Fourth Circuit's decision that the language compels this conclusion is extraordinary and insupportable. Where, as here, there is clearly "room for reasonable dispute over the construction of [the statute] based on the statutory language alone," [9] and the text "does not make crystal clear its intended scope," [10] a court's obligation to effectuate the congressional purpose demands attention to explicit legislative history that resolves any doubt about BLBA coverage of the railroad industry.

B. The Legislative History Shows Explicitly That Railroads Were Not To Be Covered.

The legislative history of the definition of "miner" shows unmistakably that railroad workers were not to be covered by the BLBA. First, the Senate Report on its version of the definition of "miner" expressly stated that

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[9] *Cass* v. *United States*, 417 U.S. 72, 77 n.5 (1974).

[10] *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 570 (1969).

"workers employed by a railroad, trucking company, or barge line" are "*beyond the scope of this legislation*" unless the company they work for "operates a mine." S. Rep. No. 209, 95th Cong., 1st Sess. 20-21 (1977) (emphasis added.[11] Second, Senator Jennings Randolph, the floor manager of the 1977 black lung legislation, repeated this understanding in his remarks introducing the bill on the Senate floor. 123 Cong. Rec. 24,239 (1977) ("Railroad, trucking, bargeline, and coke oven workers are not included in the definition."). The force of these explicit remarks is confirmed by the utter absence in the hearings, debates, or other reports of any suggestion that coverage would extend to employees of common carriers by rail, a fact never discussed by the Fourth Circuit.[12]

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[11] Reprinted in House Comm. on Education & Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 ("Black Lung Legis. Hist.") 623-24 (Comm. Print 1979).

[12] The legislative history contains several discussions of the need to extend the coverage of the Act to "outside men"—mine employees who worked above ground in various functions, such as loading, sizing, or washing the coal, transporting the coal in coal cars from the actual extraction site to the point of loading for transportation away from the mine, or loading the coal into waiting railroad cars. Nowhere in these discussions or in the texts of the bills proposed to accomplish this expansion of coverage is there any suggestion that coverage would extend to the employees of common carriers by rail. See 122 Cong. Rec. 4994 (1976) (statement of Rep. Hayes); 121 Cong. Rec. 29,880 (1975) (statement of Rep. Roncalio); S. Rep. No. 1254, 94th Cong., 2d Sess. 17 (1976), reprinted in Black Lung Legis. Hist. 352; *Black Lung Benefits Reform Act, 1976: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 89 (1976) (statement of Rep. Simon); *id.* at 180 (statement of Rep. Hayes); *id.* at 103, 150, 153, 159 (remarks of miners' representatives); H.R. 1532, 95th Cong., 1st Sess. § 2(b) (1977), reprinted in Black Lung Legis. Hist. 409, 410; H.R. 4389, 95th Cong., 1st Sess. § 2(b) (1977), reprinted in Black Lung Legis. Hist. 437, 438; H.R. 3333, 94th Cong., 1st Sess. § 3 (1975), reprinted in Black Lung Legis. Hist. 54, 56.

In a brief reference in a footnote (Pet. App. 7a n.3), the Fourth Circuit rejected this unambiguous legislative history on the ground that the Senate bill "did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner." But the conference version *narrowed* the apparent coverage of transportation workers by taking them out of the broadly-worded first sentence of the Senate's definition and adding them to the differently-worded second sentence.[13] Moreover, the Conference Report stated that the conference substitute "*conforms generally* to the Senate amendment with an amendment to *clarify* that transportation and construction workers are covered *only to the extent* they work in or around a coal mine and are exposed to coal dust." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978) (emphasis added), reprinted in 1978 U.S. Code Cong. & Admin. News 308, 309. It is not surprising that the Conference Committee report did not repeat the express statement about railroad workers in the Senate Report, because the revised statutory language did not lend itself so easily to misunderstanding as the Senate's version. In any event, it defies belief that the Conference Committee would have described its version of the bill as "conforming generally to" and "clarifying" the Senate version had it disagreed on a major point—namely, the Senate Committee's express disavowal of any intention to include railroad

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[13] The Senate bill defined "miner" to mean

> "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, *or transportation* of coal. Such term also includes an individual who works or has worked in coal mine construction during any period such individual was exposed to coal dust in his or her employment."

S. Rep. No. 209, 95th Cong., 1st Sess. 34 (1977) (emphasis added), reprinted in Black Lung Legis. Hist. 637. See Petition at 13.

workers. Had the Conference Committee intended a clear change from the Senate version by including railroad workers within the scope of the Act, it surely would not have been silent on this matter.[14]

Thus the Fourth Circuit erroneously dismissed express legislative history on the statutory definition of a "miner" that admits of only one conclusion: railroad workers are not "miners" entitled to benefits under the BLBA.

Moreover, the legislative history of the provisions under which railroads would be required to pay benefits as "responsible operators" if their workers were covered by the Act confirms that Congress did not intend the railroad industry and its employees to be covered by the BLBA.[15] The Federal Mine Safety and Health Act, of which the BLBA is a part, defines "operator" for purposes of the BLBA and was amended in 1977 to include "any independent contractor performing services * * * at [a] mine." 30 U.S.C. § 802(d).[16] But the House man-

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[14] As the Petition demonstrates (Pet. 16-17), the Fourth Circuit's rejection of the Senate Report is in direct conflict with the Eleventh Circuit's decision in *Fox* v. *Director, OWCP*, 889 F.2d 1037, 1040-41 (11th Cir. 1989) (rejecting BLBA coverage of a claimant who worked at a coke oven, which purchased raw coal for processing into coke). The Senate Report lists "coke oven workers" as well as railroad workers as "beyond the scope of this legislation," and the Eleventh Circuit relied on the Senate Report as providing a definitive list of workers excluded from BLBA coverage.

[15] The BLBA liability provision, amended in 1978 at the same time that the definition of "miner" was amended, makes any "operator of a coal mine" and any "employer, other than an operator of a coal mine" liable for payment of benefits to covered "miners." 30 U.S.C. § 932(b). The regulations refer to such persons as "responsible operators." 20 C.F.R. § 725.490(b) (1990).

[16] 30 U.S.C. § 802(d) provides in its entirety that, for the purpose of "this chapter" (which includes the BLBA), the term

> " 'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

[Continued]

ager of the 1977 mine safety amendment explicitly denied that rail transportation of extracted minerals would be subject to the Federal Mine Safety and Health Act. 123 Cong. Rec. 23,160-61 (1977) (colloquy between Representatives Patten and Gaydos). There is nothing in the legislative history of either the Federal Mine Safety and Health Act in general or the BLBA in particular to support the Fourth Circuit's conclusion that common carriers by rail were meant to be covered, notwithstanding the separate remedial scheme Congress had established for the benefit of railroad employees.[17]

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[16] [Continued]
The words, "independent contractor performing services * * * at [a] mine," do not naturally include railroads, because the work that railroads perform is not the kind that an "operator" might elect to perform itself or to delegate to a surrogate, and thus common carriers are not, as a matter of ordinary usage, "independent contractors" performing services at their customers' worksites.

[17] The legislative history of the BLBA liability provision, 30 U.S.C. § 932(b), contains an express passage showing that the reference in that provision to the liability of an "employer, other than an operator of a coal mine" was not intended to reach beyond companies that are "operators" within the meaning of 30 U.S.C. § 802(d). See the following colloquy between Representative Erlenborn and Representative Perkins (the floor manager of the Black Lung Benefits Reform Act of 1977) during consideration of the conference report on the bill that became law:

> "MR. ERLENBORN. * * * When the Federal Mine Safety and Health Amendments Act of 1977 was enacted as Public Law 95-164 on November 9, 1977, the definition of 'operator' under [30 U.S.C. § 802(d)] was amended to include 'or any independent contractor performing services or construction at such mine.' Section 7(b) of the [black lung] conference report amends section 422(b) of the act [30 U.S.C. § 932(b)] in the terms 'An employer, other than an operator of a coal mine shall not be required to secure the payment of such benefits * * *' and goes on to require such 'employer' to guarantee or secure payment of benefits where a claim is once approved. *Does section 7(b) of the [black lung] conference bill have reference to those transportation or construction employers, now 'operators' under [30 U.S.C. § 802(d) as amended]?*

In short, the legislative history of all the operative provisions of the BLBA and the mine safety act confirms that the railroad industry was simply "beyond the scope" of congressional concern at that time, as the Senate Report stated. Nor is it surprising that congressional concern was so limited. Congress enacted the BLBA because it felt that state workers' compensation laws were not providing adequate remedies for affected mine workers. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976). The BLBA was intended to supplement the state workers' compensation systems until the Secretary of Labor certified that a particular state's workers' compensation laws were adequate for black lung claims, at which time federal supervision of black lung claims administration would cease and claims would be handled under the state's workers' compensation machinery. 30 U.S.C. §§ 931, 932(b); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 109-10 (1988).

Railroads and railroad workers, on the other hand, are not subject to the state workers' compensation system. Instead, Congress had already established a separate system for railroad employees' occupational illnesses and injuries in the FELA, the Railroad Retirement Act, and the Railroad Unemployment Insurance Act—a system that displaces state workers' compensation laws (see cases cited *supra* note 4). The latter two statutes exclude from coverage precisely those persons who constitute "miners" under a proper construction of the BLBA.[18] If Congress had intended to accommodate within the framework of

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"MR. PERKINS. The gentleman is correct in that *the reference is to those transportation or construction employers now designated as operators.*" 124 Cong. Rec. 3432 (1978) (emphasis added).

[18] The Railroad Retirement Act's definition of an "employee" provides that

> "The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad loco-

the BLBA workers already covered for work-related injuries and illnesses under these railroad-specific statutes, it is inconceivable that it would not have discussed the adequacy of these other federal statutory remedies and expressly considered methods of coordinating them with the BLBA.

In sum, that Congress did not intend the BLBA to cover the railroad industry is demonstrated not just by the references to the railroad industry in specific reports and debates, but by the entire context and by the nature of the specific, non-railroad problem that Congress was addressing.[19]

The Fourth Circuit's rejection of this clear legislative history because of supposedly plain statutory language is symptomatic of wide-spread differences of opinion among the circuits on the appropriate attention owed to legislative history. Some other circuit decisions have similarly invoked the so-called "plain meaning" rule as a justification for disregarding legislative history, relying on isolated statements from this Court's opinions.[20]

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motives) of coal not beyond the mine tipple, or the loading of coal at the tipple." 45 U.S.C. § 231(b)(2).

The Railroad Unemployment Insurance Act has a parallel provision. See 45 U.S.C. § 351(d).

[19] Because the intent of Congress is clearly expressed in the legislative history, this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), does not counsel deference to the administrative agency's interpretation of the statute. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 233-34 (1986).

[20] See, *e.g.*, *United States* v. *Wilson*, 916 F.2d 1115, 1117, 1118 n.2 (6th Cir. 1990) (citing *Caminetti* v. *United States*, 242 U.S. 470, 486 (1917)); *Independent U.S. Tanker Owners Comm.* v. *Skinner*, 884 F.2d 587, 596 (D.C. Cir. 1989) (citing *Garcia* v. *United States*, 469 U.S. 70, 76 n.3 (1984)), *cert. denied*, 110 S. Ct. 1922 (1990); *United States* v. *Meyer*, 808 F.2d 912, 915 (1st Cir. 1987); *In re George Rodman, Inc.*, 792 F.2d 125, 128 & n.8 (10th Cir. 1986); *Solis-Ramirez* v. *United States Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985).

Other circuit courts recognize that they must examine the legislative history of even a seemingly plain law to insure that a literal reading of the statute does not conflict with a "'"clearly expressed legislative intention to the contrary."'"[21] Where the plain words of a statute conflict with clear, contemporaneous expressions of congressional intent in the legislative history, these courts have given effect to Congress's intent and restricted the literal reach of broad statutory language to the domain over which Congress intended the statute to operate.[22] In our view, this Court's decisions support this latter approach,[23] but it is obvious that judges on many circuits disagree. This Court should grant certiorari both to correct the clear error of the Fourth Circuit and to give further guidance to lower courts about the appropriate use of legislative history.

C. The Fourth Circuit's Insupportable Reading of the Statute Will Have Far-Reaching Consequences for the Railroad Industry.

The Fourth Circuit's decision to bring railroad workers within the coverage of the BLBA is not only mistaken concerning an important issue of statutory construction; its decision will also have far-reaching consequences for the railroad industry, by subjecting that industry to black lung claims from large numbers of em-

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[21] *United States* v. *South Half of Lot 7*, 910 F.2d 488, 489 (8th Cir. 1990) (en banc) (quoting *United States* v. *James*, 478 U.S. 597, 606 (1986)), *cert. denied*, 59 U.S.L.W. 3652 (U.S. Mar. 25, 1991) (No. 90-1069); *Berger* v. *Heckler*, 771 F.2d 1556, 1570-71 (2d Cir. 1985); *Paskel* v. *Heckler*, 768 F.2d 540, 543 (3d Cir. 1985) (holding that, despite the "plain meaning" rule, "it is *always* appropriate to look to the legislative history to help interpret a statute" (emphasis added)); *Monterey Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 743 F.2d 589, 595 (7th Cir. 1984); *Heppner* v. *Alyeska Pipeline Service Co.*, 665 F.2d 868, 870-872 (9th Cir. 1981).

[22] See, *e.g.*, *Rod Warren Ink* v. *Commissioner*, 912 F.2d 325, 327 (9th Cir. 1990); *West* v. *Kerr-McGee Corp.*, 765 F.2d 526, 529-30

ployees involved in the transportation of coal, the principal commodity transported by rail. Those employees constitute a substantial part of the railroad work force. By subjecting railroad workers' claims to a test based on the first sentence of the definition of "miner"—that is, by sweeping railroad workers doing regular railroad work into the category of mine employees "who were involved 'in the extraction or preparation of coal'" (the "function test") and "who worked 'in or around a coal mine'" (the "situs test") (Pet. App. 5a)—and ignoring Congress's express intent to exclude railroad workers from BLBA coverage, the Fourth Circuit erroneously expanded the scope of the BLBA to large numbers of railroad employees, a category of workers Congress never intended to reach.

The Fourth Circuit suggested that the impact of its decision might be limited because "the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than 'in or around a coal mine'" (Pet. App. 10a). But the court found that the "situs" test was satisfied in this case, even though the railroad carried the coal from the mine to a preparation plant 36 miles away. There is nothing in the Fourth Circuit decision that provides a basis for principled judgments based on the dis-

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(5th Cir. 1985); *Miller* v. *Federal Mine Safety & Health Review Comm'n*, 687 F.2d 194, 195 (7th Cir. 1982) (Posner, J.); *United States* v. *Stauffer Chem. Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982), *aff'd on other grounds*, 464 U.S. 165 (1984).

[23] See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 284 (1987); *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981); *Steelworkers* v. *Weber*, 443 U.S. 193, 201-02 (1979); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10, 23-24 (1976); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 458-59 (1892).

tance travelled away from a mine site or preparation facility.[24]

The Fourth Circuit also suggested that the impact of its decision might be limited because "[a]fter the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test." Pet. App. 10a. But whenever a railroad provides transportation of coal away from a coal facility, including processed coal hauled to consumers from preparation facilities and from integrated mining/preparation facilities, train crews must prepare their trains for their journey before they are loaded and, like Roberson, will perform the usual trainmen's tasks at the mine or preparation facility site: "coupling and uncoupling high pressure air hoses between cars, * * * setting and releasing brakes, and obtaining loading numbers and tags from the individual cars" (Pet. App. 3a). Thus it is difficult to see what meaningful limitations the Fourth Circuit intended to apply by virtue of the "function test," with respect to train crews serving coal mines and preparation facilities, and neither Roberson nor the federal respondent has any good basis for asserting that the decision "will impact on only a small group of railroad workers" (Roberson Br. in Opp. 11) or that the decision "is unlikely to have a significant impact on the railroad industry" (Fed. Resp. Br. in Opp. 6).[25]

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[24] Indeed, respondent Roberson takes the position that the railroad trackage connecting a mine and a preparation facility is itself a "mine" under the statutory definition and the implementing regulations. Roberson Br. in Opp. 8-9. If that is the law, then railroad workers such as Roberson would be covered by the BLBA no matter how great the distance between mine site and preparation facility and no matter how minimal the amount of time spent at either end.

[25] Other circuits have held that "the loading operation [covered by the BLBA] * * * [is] not complete until the last piece of processed coal [falls] from the tipple" into the vehicle moving the coal away from the preparation facility. *Hanna* v. *Director, OWCP*, 860 F.2d 88, 93 n.7 (3d Cir. 1988); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 490 (7th Cir. 1988). Administrative law judges are

Nor does the decision limit itself to trainmen, such as Roberson. Other railroad workers—signal and section laborers, for example—perform tasks such as maintaining and repairing railroad signal systems and track in mine territory, including the mines and preparation facilities; such workers likewise can claim that they are involved in the transportation of coal.[26]

For these reasons, the Fourth Circuit's decision has implications for the railroad industry far beyond the facts of Roberson's own circumstances. If that decision is upheld, railroads will spend years litigating the correct application of the "situs" and "function" tests, which have no sensible application to railroad workers employed by common carriers and no basis in the statutory language or history so far as the railroad industry is concerned. The burdens of such claims and proceedings would be necessary had Congress intended to impose them, but it did not. Congress did not intend to apply the BLBA to the railroad industry. This Court should act promptly to return the BLBA to its intended domain.

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already rejecting the need to apportion the time a railroad worker spent at a preparation plant between the time spent near raw coal and time spent near processed coal. *E.g.*, *Schoener* v. *Consolidated Rail Corp.*, No. 88-BLA-02125, mem. op. 9 (Dep't Labor ALJ Decision & Order Awarding Benefits Oct. 26, 1990), *appeal docketed*, No. 91-347 (Benefits Rev. Bd. Nov. 13, 1990).

Contrary to what may appear from the Fourth Circuit's discussion of *Eplion* v. *Director, OWCP*, 794 F.2d 935 (4th Cir. 1986) (Pet. App. 5a), *Eplion* does not limit the potentially broad reach of the *Roberson* decision. In *Eplion* the coal had been processed completely at another facility before its transportation to the place where Eplion worked. Thus, *Eplion* would not prevent a rail worker whose only exposure to coal dust was at a preparation plant from claiming an entitlement to benefits under the *Roberson* decision's "situs" and "function" tests.

[26] See, *e.g.*, *Eldridge* v. *Interstate R.R.*, No. 88-BLA-1870, mem. op. at 5 (Dep't Labor ALJ Decision & Order Awarding Benefits Mar. 27, 1990) (section laborer who repaired track and switches at an apparently integrated mining/preparation facility was "involved [in] working with coal which was being processed"), *appeal docketed*, No. 90-1356 (Benefits Rev. Bd. Apr. 26, 1990).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT W. BLANCHETTE
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

RALPH J. MOORE, JR.*
JOHN TOWNSEND RICH
ALOK AHUJA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for the Association of American Railroads

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* Counsel of Record